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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA

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8 THE PEOPLE'S LEGISLATURE, a Nevada
9 political action committee; and CITIZEN
OUTREACH, INC., a Virginia non-profit
10 corporation,

11 Plaintiffs,

12 v.

13 BARBARA CEGAVSKE, in her official
capacity as Secretary of State of Nevada;
and THE NEVADA LEGISLATURE,

14 Defendants.

Case No. 2:12-cv-00272-MMD-VCF

ORDER

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16 **I. SUMMARY**

17 This case concerns whether Nevada's ballot initiative is constitutional under the
18 First and Fourteenth Amendments of the United States Constitution. Before the Court is
19 Plaintiffs' Belated Motion for Leave to Add Bob Beers and Charles Muth as Plaintiffs
20 Pursuant to Rule 20 ("Plaintiffs' Motion"). (ECF No. 75.) Defendants filed a response and
21 motion to dismiss for lack of standing and a motion to stay the dispositive motion
22 deadline ("Defendants' Motion").¹ (ECF No. 76.) Plaintiffs filed a response to Defendants'
23 Motion (ECF No. 82) and a reply in support of their Motion (ECF No. 83). Defendants
24 then filed a reply in support of their Motion. (ECF No. 84.)

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26 ¹Defendants actually filed their response and two motions as one document. (ECF
27 No. 76.) These documents were subsequently docketed as three separate filings as
28 required under the Court's local rules (ECF No. 79): the response to Plaintiffs' Motion
(ECF No. 76), Defendants' Motion (ECF No. 77), and a motion to stay the dispositive
motions deadline pending resolution of the motion to add parties and motion to dismiss
("Motion to Stay") (ECF No. 78).

1 For the reasons discussed below, the Court denies Plaintiffs' Motion and grants
2 Defendants' Motion. Defendants' Motion to Stay is denied as moot.

3 **II. BACKGROUND**

4 **A. Procedural History**

5 The original complaint in this case was filed on January 18, 2012, in the Eighth
6 Judicial District Court in Clark County, Nevada. (ECF No. 1-1.) Ross Miller, then the
7 Secretary of State of Nevada, removed this action on February 21, 2012. (ECF No. 1.)
8 The Nevada Legislature became an intervenor-defendant² in this case upon the Court's
9 order of August 15, 2012. (ECF No. 53.) This case was stayed by stipulation on October
10 18, 2012. (ECF No. 56.) The stay was not lifted until three years later, on November 12,
11 2015, at which point the Court directed the parties to file a proposed amended joint
12 discovery plan and scheduling order. (ECF No. 67.) The discovery deadline was then set
13 for September 15, 2016, and the dispositive motions deadline was set for October 14,
14 2016. (ECF No. 72.) On September 26, 2016, Defendant Barbara Cegavske, the current
15 Secretary of State of Nevada, filed a motion to extend the dispositive motions deadline.
16 (ECF No. 73.) The Court granted this motion on October 5, 2016, and set the new
17 deadline for filing dispositive motions for November 16, 2016. (ECF No. 74.)

18 **B. Underlying Allegations**

19 In their Second Amended Complaint ("SAC"), Plaintiffs The People's Legislature
20 ("People") and Citizen Outreach ("Citizen") challenge the process by which citizens draft,
21 file, and circulate ballot initiative petitions under Nevada law. (ECF No. 41 at 1.) More
22 specifically, Plaintiffs challenge the single-subject restriction and 200-word description-
23 of-effect requirement established at NRS § 295.009, as well as the unlimited private
24 Attorney General enforcement provision and the mandatory venue for litigation set forth

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27 ²The SAC identifies only Ross Miller, the Secretary of State for Nevada in May of
28 2012 as Defendant.

1 in NRS § 295.061.³ (*Id.*) Plaintiffs also challenge NRS § 295.015, which they contend
2 “provides that if the Court changes one word [in the description-of-effect] all signatures
3 previously gathered are void.” (*Id.* at 1-2.)

4 The SAC asserts one claim for relief pursuant to 42 U.S.C. § 1983, contending
5 that NRS §§ 295.009, 295.115, and 295.061 are unconstitutional, both facially and as
6 applied, under the First and Fourteenth Amendments of the United States Constitution.⁴
7 (*Id.* at 20-22.) They ask this Court to: (1) declare that these three statutory provisions are
8 unconstitutional as applied and used together or, in the alternative, (2) strike one or
9 more of the statutory provisions as an unreasonable burden on free speech; and (3)
10 enter a preliminary and permanent injunction against Defendant Ross Miller, his
11 successors and assigns, and all persons acting in concert with Defendant from enforcing
12 these three statutory provisions or from removing any future proposed initiative on the
13 basis of NRS §§ 295.009 and 295.061. (*Id.* at 23.)

14 **C. Relevant Precedent**

15 In *Pest Committee v. Miller*, the Ninth Circuit Court of Appeals found NRS §§
16 295.009 and 295.061 to be facially constitutional under the First Amendment. See *Pest*
17 *Comm. v. Miller*, 626 F.3d 1097, 1103 (9th Cir. 2010). More specifically, the court
18 affirmed the district court’s holding that, “Nevada’s statutory single-subject, description-
19 of-effect, and pre-election challenge provisions do not impose a severe burden on First
20 Amendment rights, are permissible regulations of the state’s electoral process, and are
21 not unconstitutionally vague.” *Id.* at 1099. The court also found that the two statutory
22 provisions were not overly broad, finding that the “single-subject or description-of-effect
23 provisions [do] not establish that individuals or courts are unable to discern what is
24 required or that the provisions are so standardless that [they] authorize[] or encourage[]

25 ³While Plaintiffs make mention of this provision, the SAC lacks any further
26 allegations concerning how the requirement of litigating in Carson City is
unconstitutional. The Court therefore does not address this assertion in its analysis.

27 ⁴The asserted facial challenge in the SAC appears to be that “[o]n their face
28 and/or as applied, these two statutes [NRS §§ 295.009 and 295.061] are
unconstitutional[.]” (ECF No. 41 at ¶ 73.)

1 seriously discriminatory enforcement,” *id.* at 1111 (internal quotation marks and citation
2 omitted), nor “do [they] have the effect of thwarting all attempts to place initiatives and
3 referenda before the voters,” *id.* at 1113. In other words, the court found that the two
4 statutory provisions did not have a chilling effect, as the plaintiffs in the case had
5 claimed. See *id.* at 1102, 1112-13.

6 **III. DEFENDANTS’ MOTION**

7 Because Defendants’ Motion raises the threshold issue of standing, the Court will
8 address Defendants’ Motion first.

9 **A. Legal Standard**

10 To hear a case, a federal court must have subject matter jurisdiction. *Lujan v.*
11 *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The issue of standing is central to
12 establishing subject matter jurisdiction. *Id.* at 560. Rule 12(b)(1) of the Federal Rules of
13 Civil Procedure allows defendants to seek dismissal of a claim or action for a lack of
14 subject matter jurisdiction. Dismissal under Rule 12(b)(1) is appropriate if the complaint,
15 considered in its entirety, fails to allege facts on its face that are sufficient to establish
16 subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust*
17 *Litigation*, 546 F.3d 981, 984–85 (9th Cir. 2008). Although the defendant is the moving
18 party in a motion to dismiss brought under Rule 12(b)(1), the plaintiff is the party invoking
19 the court’s jurisdiction. As a result, the plaintiff bears the burden of proving that the case
20 is properly in federal court. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir.
21 2001) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

22 **B. Article III Standing**

23 “Article III of the Constitution limits federal-court jurisdiction to ‘Cases’ and
24 ‘Controversies.’” *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). “Standing is
25 examined at the commencement of the litigation.” *White v. Lee*, 227 F.3d 1214, 1243
26 (9th Cir. 2000) (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*,
27 528 U.S. 167, 170 (2000)) (internal quotation marks omitted); see also *Lujan*, 504 U.S. at
28 570 n.4 (“The existence of federal jurisdiction ordinarily depends on the facts as they

1 exist when the complaint is filed.”) (internal quotation marks and citation omitted).
2 Moreover, the party invoking standing must also show that it has standing for each type
3 of relief sought. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Therefore, the
4 Court only addresses whether People or Citizen had standing to bring as applied
5 challenges at the time of filing the original complaint.⁵

6 To establish Article III standing to bring an as applied challenge, a plaintiff must
7 allege “(1) a distinct and palpable injury-in-fact that is (2) fairly traceable to the
8 challenged provision or interpretation and (3) would likely be redressed by a favorable
9 decision.” *Real v. City of Long Beach*, 852 F.3d 929, 934 (9th Cir. 2017) (internal citation
10 omitted). To satisfy the injury-in-fact requirement under an as applied challenge, a
11 plaintiff must allege three factors: (1) an intention to engage in a course of conduct; (2)
12 the course of conduct is affected with a constitutional interest; and (3) the course of
13 conduct is proscribed by a statute and there exists a credible threat of prosecution
14 thereunder. *Id.* (citing *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2342 (2014)).

15 Defendants contend that because Plaintiffs have never actually had these
16 statutes applied to them (as Plaintiffs have never filed any initiatives with the Secretary
17 of State), Plaintiffs fail to demonstrate that they have suffered any constitutional injury.
18 (ECF No. 76 at 3-4.) In response, Plaintiffs state that in 2008 Citizen tried to draft and
19 circulate an initiative to facilitate school vouchers but chose not to file the petition
20 because “opponents” informed them that “their proposed initiative violated the single-
21 subject and word and description under NRS 295.009.” (ECF No. 83 at 5.) Thus, at the
22 time of filing the original complaint, Plaintiffs’ alleged injury was the supposed chilling of
23 their political speech, which hindered them from following through on their intended
24 course of conduct. (See ECF No. 41 at 5.)

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26 ⁵The Court does not address the alleged facial challenge to NRS §§ 295.009 and
27 295.061 (ECF No. 41 at 22). As discussed previously, *see supra* II.C, the Ninth Circuit
28 ruled that those statutory provisions were facially constitutional under the First Amendment.

1 Plaintiffs cannot satisfy all three factors of the injury-in-fact analysis under an as
2 applied challenge. In *Real*, the Ninth Circuit found that the plaintiff had satisfied the
3 injury-in-fact requirement for purposes of an as applied challenge because he had
4 alleged an intention to open a tattoo shop (without applying for a permit), tattooing is a
5 purely expressive activity fully protected by the First Amendment, and the zoning
6 ordinance proscribed his intended conduct to open a tattoo shop. 852 F.3d at 934. Like
7 the plaintiff in *Real*, who had not applied for a permit, at the time of filing the complaint in
8 January 2012, Plaintiffs had not actually filed a petition with the Secretary of State or had
9 that petition challenged in state court. However, based on the allegations in the SAC, it
10 is unclear how the statutory framework under NRS §§ 295.009, 295.015, and 295.061
11 proscribed Plaintiffs' intended conduct to file or circulate their petition. At its core,
12 Plaintiffs' concern appears to be that once they filed the petition, a powerful political
13 interest group would challenge it, and they would be required to litigate the matter in
14 court and potentially amend and refile their petition.⁶ While this may be a valid concern,
15 the Court fails to see how the three statutory provisions at issue actually act as a prior
16 restraint on Plaintiffs' ability to file their intended petition or a burden on their political
17 speech. Moreover, the Ninth Circuit held that the single-subject and description-of-effect
18 provisions do not act as a prior restraint on political speech, are content-neutral, and
19 found that the language of these provisions provided persons of ordinary intelligence
20 with a reasonable opportunity to understand what is required for the filing of ballot
21 initiatives and that it is permissible for judges to figure out how to apply these provisions

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23 ⁶Plaintiffs also appear to be concerned that the single-subject and description-of-
24 effect requirements are being applied by judges in a way that favors powerful political
25 interest groups. (See ECF No. 41 at 17.) This is a red herring, as Plaintiffs fail to provide
26 sufficient factual allegations demonstrating how these requirements or the other two
27 statutory provisions are discriminatory as applied to them. The SAC's examples of other
28 interest groups having their petitions overturned does not remedy the SAC's failure to
identify a credible injury to Plaintiffs. In other words, Plaintiffs fail to demonstrate how the
statutory provisions made *their* filing a petition pointless. Highlighting instances where a
powerful interest group won does not actually demonstrate a constitutional deficiency
with the statute.

1 over time.⁷ *Pest Comm.*, 626 F.3d at 1113. The court also found that the pre-election
2 challenge provision in NRS § 295.061 did not severely burden political speech and was
3 a permissible regulation of Nevada’s electoral process. *Id.* at 1099. In light of the Ninth
4 Circuit’s determinations, this Court finds that the SAC fails to allege sufficient facts to
5 bring novel claims as applied to Plaintiffs outside those already resolved in the *Pest*
6 *Committee* decision.⁸

7 Plaintiffs thus lack standing to bring as applied challenges to NRS §§ 295.009,
8 295.015, and 295.061. This Court is therefore precluded from exercising jurisdiction over
9 this case.

10 **IV. PLAINTIFFS’ MOTION**

11 Plaintiffs seek to add Bob Beers (“Beers”), a former Nevada state senator and
12 current commissioner of the Las Vegas City Council, and Charles Muth (“Muth”), the
13 current CEO of Citizen, to this action as additional plaintiffs under Federal Rule of Civil
14 Procedure 20, claiming that both individuals were “directly or indirectly plead [sic] to a
15 sufficient degree of notice” (ECF No. 75 at 2-3). While Defendants contend that Plaintiffs
16 seek to add these two additional plaintiffs to cure their lack of standing (ECF No. 76 at
17 4), Plaintiffs state they seek to add Beers and Muth because the two individuals did not
18 request to be added as plaintiffs until October 2016 (ECF No. 83 at 3.) Yet, Plaintiffs’
19 reasoning does not explain why either individual should be added absent any issues with
20 Plaintiffs’ own standing, as two of the petitions identified in Plaintiffs’ Motion were filed
21 after the start of this litigation—both Beers and Muth filed petitions in 2016 that were

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24 ⁷This last holding concerning judicial development of case law directly addresses
25 Plaintiffs’ concern that the two judges who deal with these matters at the First Judicial
26 District Court in Carson City have no special training in election law or additional
expertise. (See ECF No. 41 at 7.) The United States Constitution does not require that
judges be experts in any one area of law.

27 ⁸While Plaintiffs also attempt to bring a novel claim by challenging the
28 constitutionality of the petition amendment procedure in NRS § 295.015(2) (see ECF No.
41 at 6), they fail to provide sufficient factual allegations as to how that provision
proscribed their ability to file or circulate their proposed petition.

1 then challenged under NRS §§ 295.009 and 295.061 (*id.* at 4, 6)—and the other two
2 petitions were never even filed.

3 Because standing is determined by the facts as they existed at the time the
4 original complaint was filed, *see Lujan*, 504 U.S. at 570 n.4, the two proposed plaintiffs
5 would not have standing to bring an as applied challenge based on their subsequent
6 2016 petitions. Plaintiffs also note that Beers attempted to circulate a petition in 2005⁹
7 (ECF No. 75 at 2), just as Muth/Citizen had attempted to do in 2008. Disregarding
8 potential statute of limitations issues with adding this claim, the failure to file the 2005
9 petition suffers from the same defect as does Muth/Citizen's failure to file the 2008
10 petition. Therefore, even if Defendants are correct that the reason for adding Beers and
11 Muth is to cure defects with Plaintiffs' standing, the addition of the two as plaintiffs fails to
12 do so.

13 For these reasons, Plaintiff's Motion is denied.

14 **V. CONCLUSION**

15 The Court notes that the parties made several arguments and cited to several
16 cases not discussed above. The Court has reviewed these arguments and cases and
17 determines that they do not warrant discussion as they do not affect the outcome of the
18 parties' motions.

19 It is hereby ordered that Plaintiffs' motion to add parties (ECF No. 75) is denied
20 and Defendants' motion to dismiss (ECF No. 77) is granted.

21 It is further ordered that Defendant's motion to stay the dispositive motions
22 deadline (ECF No. 78) is denied as moot.

23 The Clerk is instructed to enter judgment accordingly and close this case.

24 DATED THIS 25th day of May 2017.

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26 _____
MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

27 _____
28 ⁹It is unclear whether the attempt was made in 2005 or 2006. (See ECF No. 83 at 4.)